
IN THE
Supreme Court of the United States
OCTOBER TERM 1975

Supreme Court, U. S.

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No. 75-239

WILLIE STAMPS, JAMES ATKINSON, DARNEY STANFIELD, Individually and On Behalf of All Other Persons Similarly Situated,

Petitioners,

v.

DETROIT EDISON COMPANY, Local 223 UTILITY WORKERS UNION OF AMERICA, and Local 17 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

BRIEF OF DETROIT EDISON COMPANY IN RESPONSE TO PETITION OF STAMPS, ET AL. FOR CERTIORARI

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This brief is submitted by The Detroit Edison Company (hereinafter "Edison") in response to the petition of Willie Stamps, et al. (hereinafter "plaintiffs") for a writ of certiorari.

Plaintiffs seek certiorari with respect to two questions. The first relates to the issue of punitive damages; the second relates to the showing required in order to permit employees, alleged to have been discriminated against in respect of transfer to so-called "high opportunity" jobs, to receive "back pay" awards under Title VII.

As will be developed hereafter, we believe the first of these questions cannot properly be presented by the record in this case and that certiorari with respect to that question should be denied. The second question, however, is appropriately presented by the record and is inextricably interwoven with questions which Edison itself has raised in its petition for certiorari in *Detroit Edison Company v. EEOC, et al.*, No. 75-393. Thus, while we disagree with the reasons asserted by plaintiffs in support of their petition with respect to the second question, and while we believe that question should be re-stated (as indicated below), we agree with private plaintiffs that certiorari on said question should be granted.

Counter-Statement of Questions Presented

Edison believes that petitioners' statement of the questions presented is inaccurate and inadequate. In Edison's opinion, the questions presented are as follows:

1. In an employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, in which plaintiffs obtained an order striking defendant's timely demand for trial by jury on the ground that a jury trial was not available in such an action, may plaintiffs thereafter obtain from the trial court an award of punitive damages and, if so, do the facts and circumstances disclosed by the record here justify such an award?

2. In an employment discrimination action in which the trial court found that certain (but only certain) black employees were "locked in" to "low opportunity" jobs, and where the record established that substantial numbers of black employees were, in fact, promoted to "high opportunity" jobs, may all black employees obtain awards of "back pay" without a showing on behalf of each

claimant for back pay that he applied for, or even indicated a desire to transfer to, a particular vacant job, and that the job was subsequently filled by someone no better qualified than he?

Counter-Statement of the Case

Plaintiffs' statement of the case does not fairly or adequately present the facts necessary to an understanding of the issues here sought to be reviewed. A counter-statement of the case is therefore in order:

1. On May 17, 1971, plaintiffs brought this action for monetary and injunctive relief against Edison and two labor unions, alleging racial discrimination. The complaint alleged violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964.

Edison filed a timely demand for trial by jury.

After commencement of the action, private plaintiffs moved for leave to amend the complaint to seek punitive damages against Edison, based upon allegations of post-complaint harassment. Plaintiffs also filed a motion to strike Edison's timely demand for a jury trial.

Both motions were heard simultaneously. At the argument, plaintiffs' counsel repeatedly took the position that Edison was not entitled to trial by jury because the action had been brought under Title VII. Thus, the transcript discloses (p. 27):

"Now, in the particular case, I think, your honor, what we really have to consider is what the gravamen of the whole thing is, and we submit that the whole—the important issue here, the thing to be determined is whether or not we have a case where in accordance with Title VII they should be—there has been discrimination. That's what we're talking about."

And further (p. 28):

“We submit, your honor, that the courts—that this court has already stated that Title VII, in part 706, 706(g), does give this court the right and the power to try this case without a jury and where it deems necessary to provide any other equitable relief as the court deems appropriate and I think, as they begin to point out in this section, the types of relief that they had in mind at the beginning, and it indicates that this kind of relief, punitive, would not be deemed necessary—necessarily the kind of relief that requires a jury trial.”

And still further (p. 29):

“Now, we submit that the court can make the determination as to whether or not it deems appropriate punitive damages in this particular case and we submit it is empowered to do so without a jury and that there is no—there is no right to a jury trial merely because as a part of the relief requested money damages are requested and we submit that the fact that we have included punitive damages in addition to back pay and the attorney’s fees does not change the gravamen of this case. The issue here is whether or not there has been discrimination in employment and whether or not that there should be some type of punishment or some type of relief given by this court.

“And we submit, because of that main issue and because there is no provision that provides for a jury trial in accordance with that Title VII, that no jury trial right exists in this particular case and we would ask the court to consider whatever relief it deems appropriate in accordance with the section I just mentioned and if it sees fit to grant punitive damages and that it does have the power to do this without a jury trial, your honor.”

Private plaintiffs prevailed in their argument. The trial court granted leave to add a punitive damage claim, and at the same time entered an order striking Edison's demand for a jury trial.

At the opening of the trial, Edison once again raised the question of its right to trial by jury but the Court, after formally preserving Edison's jury trial demand on the record, proceeded to trial without a jury.

On October 2, 1973, the trial court rendered its opinion on the merits, together with its Findings of Fact and Conclusions of Law. The Court made no findings whatsoever with respect to post-complaint harassment, the basis upon which punitive damages were demanded in the complaint. Instead, the Court awarded punitive damages of \$4,000,000 against Edison on the ground that Edison had been "obdurate" and "intransigent". There are, however, no formal findings of fact to support these conclusions. An examination of the trial court's opinion, moreover, clearly establishes that the award of punitive damages was based largely on the fact that Edison's trial counsel chose to defend Edison rather than to comply with the trial judge's invitation that counsel concede that his client had been guilty of discrimination.

After the taking of evidence had been completed, but prior to the time when the District Court entered its Findings of Fact and Conclusions of Law, plaintiffs moved for leave to amend to seek punitive damages against one of the two unions named as defendants in the action. On June 4, 1973, the trial court denied the motion on grounds of prejudice to the union. Notwithstanding the denial of the motion to amend, the trial court, on October 2, 1973, awarded punitive damages against the union for \$250,000.

On March 23, 1974, the trial court rendered a memorandum order disposing of various post-trial motions, including a motion by the union to set aside the punitive

damage award. In denying that motion, the Court held that "the broad equitable remedy under Title VII of the Civil Rights Act of 1964 grants it discretionary power to make such awards as are just and equitable, including punitive damages."

On appeal, the Sixth Circuit held that no such power existed under Title VII, pointing out that punitive damages were legal and not equitable in nature; that under this Court's decision in *Curtis v. Loether*, 451 U.S. 189, 194, defendants were entitled to a jury trial of a claim for punitive damages; that Edison had, in fact, demanded a jury trial; and that the District Court had declined to permit such a trial. Having concluded that the trial court did not have the power to award punitive damages, the Court of Appeals did not address itself to the question whether the evidence in the case would have justified a punitive damage award had the remedy been available.

2. As indicated above, the trial court had found that certain—but only certain—black employees had been discriminated against in respect of transfer and promotion from "low opportunity" jobs to "high opportunity" jobs. It is beyond dispute that other black employees of Edison had obtained such "high opportunity" jobs. Thus, the trial court, in defining the "affected class" for purposes of hiring and transfer, limited the employee class to "black employees who were hired prior to the date of the decree and who were actively employed at any time prior to July 2, 1965, and who were at any time regular employees in the job classifications referred to above as low opportunity jobs." (Emphasis added.) Having so limited the class, the Court then directed defendants to pay each member of the class an amount equal to the average earnings of skilled trades "high opportunity" jobs since July 2, 1965, less the amount each member of the class actually earned during that period up to the date of the Decree. Under the District Court's order, each such individual was entitled to a

monetary award without regard to the number of "high opportunity" jobs which were actually available during the period; without regard to the individual's qualifications to fill any of such positions; without regard to whether the individual sought to obtain such a position, or indicated an interest, or was, in fact, interested therein; and without regard to whether or not the denial of any such transfer resulted from the transfer of more qualified applicants (including, possibly, better qualified black applicants) rather than racial discrimination.

Although the Court of Appeals improperly expanded the employee class to include *all* employees, it sought to remedy some of the obvious deficiencies of the District Court's order with respect to the burden of proving entitlement to an award of back pay. In its May 16, 1975 amendment of its original opinion, the Court of Appeals first required each employee-claimant seeking damages by reason of alleged discrimination in respect of transfer to high opportunity jobs to establish that (1) he was a member of a racial minority; (2) he applied for and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications he was rejected; and (4) the position was ultimately filled by someone possessing qualifications equal to that of the applicant, or someone less qualified. The Court thus fashioned a standard of proof similar to that set forth in this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802.

However, the Court then proceeded to undercut substantially the *McDonnell Douglas* standard by relieving employees of the obligation to show that they, in fact, applied for transfer to available positions. It is sufficient, under the amended test enunciated by the Court of Appeals on rehearing, if the employee merely "indicated a desire" to transfer but "did not do so because it would have been futile under existing company practices."

As noted in Edison's petition for certiorari in No. 75-393, the May 16 modification opens the door to wholly unwarranted damage awards on the basis of uncorroborated and possibly perjurious testimony, difficult if not impossible to rebut. Yet, plaintiffs are dissatisfied even with this standard. They seek to have this Court shift the entire burden to defendant to show that the employee claiming back pay "would never have been advanced because of that individual's particular lack of qualifications".

Moreover, in their Petition for Certiorari (pages 9-10), plaintiffs appear to misread the May 16 amendment of the Court of Appeals as applying not only to employees in regard to job transfers, but also to rejected applicants in regard to new hires. Clearly the Sixth Circuit, even in its unwarranted expansion of the *McDonnell Douglas* test, does not purport to relieve rejected applicants from the burden of showing that they applied for and were qualified for a job opening. The court specifically states that "Requirement (ii) above [quoted from *McDonnell Douglas*], may be satisfied by an *employee's* showing that he indicated a desire to *transfer* to a vacant job." (Emphasis added.) There was no intimation that the court sought to modify *McDonnell Douglas* for the benefit of rejected applicants.

Much of plaintiffs' "statement of the case" is devoted to a lengthy recital of selected findings of the District Court. These lengthy recitals do not aid in an understanding of the issues here sought to be reviewed; they appear to be included only for the purpose of attempting to prejudice the Court against Edison and the other defendants. No useful purpose would be served at this time in detailed analysis of the Findings and the evidence upon which they are based. It is sufficient here merely to note, as did the Court of Appeals, that the Findings are based in large part upon events which occurred prior to 1965—in some instances events which are alleged to have occurred to the mid-1940's. The Findings by no means reflect the situation as it existed

either at the time of the filing of the complaint, or of trial. We also note that the Court of Appeals, while affirming the findings of the District Court, noted specifically that Edison had offered justification for its hiring practices; and that the evidence upon which the finding of discrimination with respect to promotion was based was in conflict.

Reasons Why the Writ Should Not Be Granted With Respect to the Punitive Damage Issue

It is of the utmost significance that plaintiffs have now abandoned any reliance on Title VII to support the claim that there is a statutory basis for an award of punitive damages in this action. Plaintiffs' reliance in this Court is solely on the provisions of 42 U.S.C. § 1981.*

As this Court has so clearly indicated, however, an action for punitive damages under § 1981 is an action at law (*Johnson v. Railway Express Agency*, — U.S. —, 95 S.Ct. 1716) and as such is subject to defendant's right to a jury trial. (*Curtis v. Loether*, 415 U.S. 189). As we have previously stated, plaintiffs strenuously opposed a jury trial in this action, even though Edison had filed a timely jury demand, and plaintiffs prevailed in their position in the District Court. Having thus successfully prevented a jury trial in the District Court by arguing that their § 1981 case was simply an adjunct to their Title VII case, plaintiffs now seek to rely on purported findings by the trial court, entered without a jury, to support a punitive damage award.

Had this case been tried by a jury or, alternatively, had Edison not sought a jury trial, the punitive damage issue sought to be raised by plaintiffs might, perhaps,

* For present purposes, we may ignore § 1988, also cited by plaintiffs, which merely confers jurisdiction on the District Courts to remedy violations of § 1981 *et seq.* and provides for the application of state law in certain cases.

have been appropriate for review by this Court. But the record in this case does not present that question. At least in respect of punitive damages, the trial court had no legal right to make findings upon which to predicate a punitive damage award. Obviously, findings made by one not authorized by law to be a trier of the facts cannot lawfully form the basis of any resulting judgment. *Rogers v. Loether*, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189. For purposes of punitive damages, therefore, the Findings must be treated as though they did not exist. Only a jury could have made the Findings necessary to sustain a punitive damage judgment, and plaintiffs' successful motion to strike the jury demand precluded any such jury findings.

It is respectfully submitted that, under these circumstances, the question here sought to be raised is not presented by the record in this case. It is also respectfully submitted that insofar as the punitive damage questions are concerned, plaintiffs' petition for certiorari should be denied.

With Respect to the Showing Required for Individual Entitlement to Back Pay

Plaintiffs and Edison both disagree with the order finally adopted by the Sixth Circuit regarding the burden and the showing necessary as a predicate for an award of back pay to employees who were not, in fact, transferred to so-called "high opportunity" jobs.

Plaintiffs' counsel urge that the test is too favorable to Edison. As indicated in our petition for certiorari in No. 75-393, Edison believes that the formulation is improper, unfair, and conducive of perjury.

Plaintiffs' position totally misconceives the nature of the judgment which has been rendered against defendants. Plaintiffs erroneously assert "No question remains in this

case as to whether individuals have been injured by the law's violation; violation and *the fact of injury to a victim class has been established.*" (Pltfs. Pet. for Cert. at 14) (Emphasis added.)

Nothing could be further from the truth. Injury certainly has not been established to all members of the affected class. That is precisely what must be proven at the subsequent hearings on entitlement to back pay. At these hearings, the parties must address themselves to such issues as (1) the number of jobs available to be filled during the relevant period, which would be the most extreme measure of injury and which in all likelihood will be less than the number of back pay claimants; (2) the qualifications of individual claimants to fill job vacancies; (3) the desire or interest of each claimant for or in a new job measured as of the time vacancies existed; and (4) the appropriateness of giving job consideration to black or white applicants and employees who were better qualified than individual claimants.

Plaintiffs do not serve the cause of clarity or fairness in arguing the burden of proof issue on the false premise that a finding of discrimination means that all members of the affected class have been monetarily injured. Nor should the back pay issue be resolved by imposing upon a defendant an unrealistic and well-nigh impossible burden or one which would result in windfalls to people who did not, in fact, suffer discrimination.

We do agree with plaintiffs, however, that the test adopted by the Sixth Circuit presents a compelling and significant legal issue, which is likely to recur and which has not yet been, but should be, resolved by this Court. We also believe that the Sixth Circuit's opinion is directly contrary to this Court's decision in *McDonnell Douglas Corp. v. Green* and is basically in conflict with the erroneously decided Fifth Circuit decision in *Baxter v. Savannah*

Sugar Refining Corporation, 495 F.2d 437 (5th Cir. 1974). We, therefore, agree with plaintiffs' conclusion that certiorari should be granted to consider the second of the two questions sought to be raised by plaintiffs.

Conclusion

For each of the reasons advanced, it is respectfully submitted that the petition for certiorari should be denied in part and granted in part.

Respectfully submitted,

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